IN THE HIGH COURT OF DELHI AT NEW DELHI

Crl.M.C.5638-44/2005

Sushila Devi .....Petitioners
! through: Mr.Mr. Vijay Sharma, Adv.

VERSUS

$ Securities and Exchange Board of India .....Respondents
through: Mr.Atul Sharma, Adv.

% RESERVED ON : 06.08.2007

DATE OF DECISION: 13-08-2007

CORAM:

* **Hon'ble Mr.Justice Pradeep Nandrajog**

1. Whether reporters of local papers may be allowed to see the judgment? Y

2. To be referred to the Reporter or not? Y

3. Whether judgment should be reported in Digest? Y

: PRADEEP NANDRAJOG, J.

1. Securities and Exchange Board of India (SEBI) filed a complaint against the petitioners under Section 200 of the Code of Criminal Procedure, 1973 read with Section 24(1) and 27 of the Securities and Exchange Board of India, 1992. Inter alia, it was stated that Section 11 of the Act casts upon SEBI the duty to protect the interest of investors in securities and that SEBI was enjoined upon to promote the development of and to regulate the securities market through appropriate measures.

2. It was stated that the last decade had witnessed initiative by private entrepreneurs to undergo plantation activities on a commercial scale. It was noted that promoters would invest minimal amounts in such ventures. They would raise funds from ordinary investors in the absence of regulatory mechanisms. It was stated that the high returns promised under the schemes were questionable. It was stated that in the year 1997 certain guidelines were framed pertaining to plantation companies.

3. Listing out various regulations which require to be complied with in the year 1997 and alleging that the same were not complied with, complaint was filed alleging violation of Section 27 of the Act as also the regulations framed.

4. Pertaining to petitioners 1 to 7 who were impleaded as respondents 2 to 9 following averments were made in para 7 of the complaint :-

> "7. The accused No.1 is a company registered under the provisions of the Companies Act and the accused No.2 to 9 are the directors of the accused No.1 company. The accused No.2 to 9 are the persons incharge and responsible for the day to day affairs of the company and all of the were actively connived with each other for the commission of the offences."

5. At the hearing, learned counsel for the petitioners urged a limited submission being that the averment that petitioners were the directors and person in charge and responsible for the

day-today affairs of the company was insufficient to proceed against the petitioners. Thus, counsel urged that the order dated 15.12.2003 summoning the petitioners to answer the charges was liable to be quashed.

6. I need not discuss a plethora of authorities on the issue as to what constitutes sufficient averments in a complaint to make it actionable vis-a-vis the directors of a company.

7. Officers responsible for the conduct of the affairs of a company are generally referred to as directors, managers, secretaries etc. With reference to Sections 291 to 293 of the Companies Act, 1956 it would be evident that what a board of directors of a company is empowered to do depends upon the roles and functions assigned to the directors as per the memorandum and articles of association of a company.

8. It would be sufficient for me to state that the question as to what is the role of a director in a company is a question of fact.

9. Since criminal liability is foisted upon a director not merely on account of his or her being a director but on account of a conduct, act or omission, there must be a averment in a complaint relatable to the said act or omission.

10. What would be said sufficient averment?

11. The answer is found in a 3 member bench decision of the

Supreme Court reported as *SMS Pharmaceuticals Ltd. Vs. Neeta Bhalla & Ors.* 2005 8 SCC 89 wherein it was observed that a clear, unambiguous and specific allegation against a person impleaded as an accused that he was in charge of and responsible to the company in the conduct of its business at the material time when the offence was committed is sufficient.

12. Decision in *SMS Pharmaceuticals Ltd.'s* case has been a subject matter of consideration by the Supreme Court in the latest pronouncement reported as *N.Rangachari Vs. BSNL* (2007) 5 SCC 108 in para 19, 21 and 23 following was observed by the Supreme Court:-

> "19. Therefore, a person in the commercial world having a transaction with a company is entitled to presume that the Directors of the company are in charge of the affairs of the company. If any restrictions on their powers are placed by the memorandum or articles of the company, it is for the Directors to establish it at the trial. It is in that context that Section 141 of the Negotiable Instruments Act provides that when the offender is a company, every person, who at the time when the offence was committed was in charge of and was responsible to the company for the conduct of the business of the company, shall also be deemed to be guilty of the offence along with the company. It appears to us that an allegation in the complaint that the named accused are Directors of the company itself would usher in the element of their acting for an on behalf of the company and of their being in charge of the company. In Gower and Davies *Principles of Modern Company Law* (17th Edn.), the theory behind the idea of identification is traced as follows:
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> > "It is possible to find in the cases varying formulations of the underlying principle, and the most recent definitions suggest that the

courts are prepared today to give the rule of attribution based on identification a somewhat broader scope. In the original formulation in Lennard's Carrying Company case Lord Haldane based identification on a person 'who is really the directing mind and will of the corporation, the very ego and centre of the personality of the corporation'. Recently, however, such an approach has been castigated by the Privy Council through Lord Hoffmann in *Maridian Global case* as a misleading 'general metaphysic of companies'. The true question in each case was who as a matter of construction of the statute in question, or presumably other rule of law, is to be regarded as the controller of the company for the purpose of the identification rule."

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21. A person normally having business or commercial dealings with a company, would satisfy himself about its creditworthiness and reliability by looking at its promoters and Board of Directors and the nature and extent of its business and its memorandum or articles of association. Other than that, he may not be aware of the arrangements within the company in regard to its management, daily routine, etc. Therefore, when a cheque issued to him by the company is dishonoured, he is expected only to be aware generally of who are in charge of the affairs of the company. It is not reasonable to expect him to know whether the person who signed the cheque was instructed to do so or whether he has been deprived of his authority to do so when he actually signed the cheque. Those are matters peculiarly within the knowledge of the company and those in charge of it. So, all that a payee of a cheque that is dishonoured can be expected to allege is that the persons named in the complaint are in charge of its affairs. The Directors are prima facie in that position.

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23. In the light of the ratio in *S.M.S Pharmaceuticals*

> *Ltd.* what is to be looked into is whether in the complaint, in addition to asserting that the appellant and another are the Directors of the company, it is further alleged that they are in charge of and responsible to the company for the conduct of the business of the company. We find that such an allegation is clearly made in the complaint which we have quoted above. Learned Senior Counsel for he appellant argued that in *Saroj Kumar Poddar case* this court had found the complaint unsustainable only for the reason that there was no specific averment that at the time of issuance of the cheuqe that was dishonoured, the persons named in the complaint were in charge of the affairs of the company. With great respect, we see no warrant for assuming such a position in the context of the binding ratio in *S.M.S Pharmaceuticals Ltd.* and in view of the position of the Directors in a company as explained above."

13. Thus, I hold that the complaint makes material averments sufficient to attract cognizance of the complaint and issuance of the summons to answer the charge.

14. The second submission made by learned counsel for the petitioners and for which board resolutions were relied was to urge that petitioners 1, 2 , 4 and 6 were mere investors. That they merely signed the proposal form of directorship. That they never attended any board meeting. That in September, 1997 they were removed from the directorship of the company.

15. Relevance of said submission is that as per the complaint accused No.1 company had acted contrary to directions issued on 18.11.1997.

16. It was thus urged that by November 1997, petitioners 1, 2, 4 and 6 had ceased to be the directors of accused No.1.

17. I am afraid, said plea cannot be taken into account as it relates to a defence which has to be proved after leading evidence.

18. However, I would be failing if I do not note that the respondent has placed on record a letter dated 13.1.1998 written by accused No.1, i.e. the company enclosing therewith certain information. Balance sheet of the company as of 31.12.1997 has been submitted under cover of said letter. Petitioner No.1 and 2 have signed the balance sheet of the company as on 31.12.1997. Further, letter dated 13.1.1998 informs SEBI that all 8 persons impleaded as accused were the directors of the company.

19. Qua petitioner No.1, Sushila Devi, I note it was informed that she was the Managing Director.

20. As clarified in *SMS Pharmaceuticals Ltd.* case, by its very nomenclature, a person who holds the post of managing director would be presumed to be managing and controlling the affairs of a company.

21. I find no merits in the petition.

22. Dismissed.

August 13, 2007
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PRADEEP NANDRAJOG
JUDGE